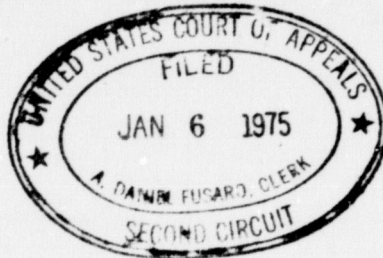


***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF



B
P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-2173

RICHARD G. BOLIO, JR., Plaintiff-Appellant

VS

FORD MOTOR COMPANY Defendant-Appellee

Appeal from the United States District
Court for the District of Vermont
Civil Action No. 73-93

BRIEF OF APPELLEE

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ISSUES PRESENTED

WHETHER THE TRIAL COURT RULED PROPERLY ON THE
EXCLUSION OF EVIDENCE OF DAMAGE

WHETHER THE TRIAL COURT RULED PROPERLY ON THE
MOTION TO DISMISS

BRIEF OF APPELLEE

This action concerns itself with a 1972 Model WT 9000 tractor truck, manufactured by the defendant Ford and sold to the plaintiff by Nordic Ford, Inc. Nordic, a Vermont corporation in Burlington, is the local seller of Ford products. Both at the time of trial and in his brief, the plaintiff seems to treat the two corporations as one, even though Judge Coffrin's rulings were to the contrary (example TR. 26) and also in spite of his strong suggestions that the dealer should have been a party (TR. 177, 190).

Bolio, who was in the business of hauling cattle, was in a hurry to obtain this tractor (TR. 31) as he had already purchased a cattle trailer in Indiana with the help of Nordic and had contracted to pick up a load of cattle in Vernon, New York (TR. 92). Rather than waiting for delivery in Vermont he arranged to go to the truck plant in Louisville, Kentucky, to pick up the vehicle (TR. 41). Manning Equipment Co. of Louisville was to install a "fifth wheel" and mud flaps, and although the testimony was inconclusive it is submitted that none of the "dealers preparation" was done. (TR. 44, 94, 96). This is the normal routine customarily done by the dealer to prepare the vehicle for service on the highway.

Bolio brought the Ford because he was able to get a better price (TR. 32) for the type of vehicle he wanted, owning several at the time of this incident. The date of the Nordic purchase invoice signed by Bolio was July 24, 1972. (P.E. 6). Immediately above his signature it said in part:

The salesman has shown me and I have read the matter on the back hereof and agree to it as a part of this order the same as if it had been printed above my signature.

In addition, incidentally, to providing there was no agency relationship between the dealer and Ford, it stated in bold print on the reverse of the order:

There are NO WARRANTIES, express or implied, made by the Selling Dealer or the manufacturer on the new vehicle or chassis described on the front of this order, except the most recent printed Ford Motor Company warranty or warranties applicable to such new vehicle or chassis which are made a part of this order as of here set forth in full. A copy of such Ford Motor Company warranty or warranties will be furnished to the purchaser upon delivery of the vehicle or chassis, and they shall be expressly IN LIEU OF any other express or implied warranty, condition or guarantee on the new vehicle, chassis or any part thereof, including any implied WARRANTY of MERCHANTABILITY or FITNESS and of any other obligation on the part of Ford Motor Company or the Selling Dealer.

NO WARRANTIES, express or implied, of MERCHANTABILITY or FITNESS or otherwise, are made by the Selling Dealer or Ford Motor Company with respect to any used vehicle or chassis described on the front of this order except such warranty, if any, as may be expressed completely in writing by the Selling Dealer or Ford Motor Company on this order or separate instrument delivered to the purchaser. The applicability of any such warranty shall be subject to all the terms and conditions therein stated.

The Ford warranty Bolio received with the truck (TR. 149) provided in part as follows:

Ford and the Selling Dealer jointly warranty with respect to each 1972 model medium and heavier truck built by Ford that the Selling Dealer will repair or replace any of the following parts that are found to be defective in factory material or workmanship on the following basis:

Any part during the first 12 months or 12,000 miles of operation, whichever occurs first (except tires and diesel engines manufactured by others than Ford, which are separately warranted by their manufacturers); without charge for parts and labor.

Any part of the engine block, head and all internal engine parts, water pump, intake and exhaust manifolds, flywheel and flywheel housing, clutch housing (excludes manual clutch assembly and clutch release bearing), transmission case and all internal transmission parts (includes auxiliary transmission), transfer case and all internal parts, drive shaft, and drive shaft support bearings, universal joints, drive axle housing and all internal parts (excludes drive wheel bearings) and drive axle shafts, after 12,000 miles and during the first 12 months or 50,000 miles of operation, whichever occurs first; for a charge of 50 percent of the dealer's regular warranty charge to Ford for parts and labor.

* * *

. . . Neither Ford nor any of its dealers assume any responsibility under this warranty for any loss of use of the vehicle, loss of time, inconvenience, commercial loss or consequential damages.

* * *

DISCLAIMER OF IMPLIED WARRANTIES:

Except for responsibility for personal injuries shown to have resulted from a defect, THIS WARRANTY IS, to the extent allowed by law, EXPRESSLY IN LIEU OF any other express or implied warranty, condition or guarantee agreement or representation by any person with respect to the vehicle or any part thereof, including ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS and the repairs and replacements provided for in this warranty constitute the owner's exclusive remedy.

Bolio took delivery of the vehicle in Louisville on August 1, 1972. On the return trip to Burlington Bolio had a number of problems (TR. 48), most of which would have been picked up on dealers preparation (TR. 97). Whenever he had any problems subsequently, he took the vehicle to Nordic, who also upon occasion called in Ford and other representatives. Although Bolio received some service invoices, he never paid any (TR. 76) and the bills were submitted by Nordic under warranty claims to Ford (TR. 161).

On October 28, 1972 Bolio claims he bought a new tractor to replace the Ford (TR. 68, 80, 81). In March of 1973 after putting 42,000 miles on the Ford (in 7 1/2 months) Bolio left the tractor at Nordic and abandoned it. (TR. 62) There is no evidence tending to show that Nordic or Ford did not repair or replace whatever was necessary on each occasion, for the various complaints Bolio had.

ARGUMENT

THE TRIAL COURT RULED PROPERLY ON THE EXCLUSION OF EVIDENCE OF DAMAGE, AND THE MOTION TO DISMISS.

As the record will show, the original pleadings were lengthy and varied, and all counts were dismissed except Count I which appears to be in express and implied warranty. The Court made a number of rulings on offered evidence during the trial, but it is understood that the sole basis of the present appeal centers around the enforcement by the Court of the express language of the documents. In some of the preliminary pages the plaintiff raises, without citation, what he conceives to be the sociological aspects of the claim. If it is appropriate to respond to it, we would simply point to his own testimony that Bolio made what he thought was the best deal.

Basic to the resolution of the legal issues in the case is the effect to be given to the language of the documents. In a case not decided under the Uniform Commercial Code, the Vermont Supreme Court, dealt with the issue of disclaimer. In the case of Hathaway et al v. Rays Motor Sales, 127 Vt.

279, 247 A2d 512 (1968), the retailer , among other things, provided in the sales documents, "the only warranty is that of the manufacturer". The Court held, "the foregoing disclaimer of warranty is in bold print and is so connected with the entire transaction as to form a part of the sales agreement within the rule stated in Newton v. Smith Motors, Inc., 122 Vt. 409, 412, 175 A2d 514." Surely this is evidence that the Vermont courts do not find disclaimers unconscionable, even in a non-commercial situation, such as this was, prior to the U.C.C. See also, Rozen v. Chrysler Corp., 142 So. 2d 735 (1962), (apparently a non-U.C.C. pleasure car disclaimer).

The question has been raised as to whether dealings between the manufacturer and the ultimate purchaser are governed by the Uniform Commercial Code, since in this relationship the manufacturer is not a "seller", as to this plaintiff, and therefore the disclaimer provisions of the U.C.C. are not applicable. Ford Motor Co. v. Pittman, 227 So. 2d 246 cert. den. 237 So. 2d 177, (1969 Fla.). In that regard it is interesting to note that in 9 A § 2-316 of the Vermont act, Vermont added subsection (5) and specifically uses the words "seller or manufacturer of consumer goods" evidencing a Vermont intent to allow manufacturers to disclaim. It is submitted that even if the U.C.C. were not to apply the Hathaway case enunciates the willingness of the Supreme Court to recognize such disclaimers. There also appears to be some reluctance to impose liability for consequential economic loss on remote parties. Price v. Gatlin, 405 P.2d 502 (1965).

It should be noted that in this case the great bulk of the plaintiff's claim, which indeed is vital to sustain Federal jurisdiction, is his "down time" or loss of profit, if any, from the truck. This is not a claim for

personal injury or property damage because of a defect in the truck, nor even that he is out of pocket for repairs and the like. If this case is to be governed by the U.C.C., resort should be had to its provisions. Section 2-714(3) provides that in a proper case consequential damages may be recovered and refers to 2-715. The note to that section says:

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

Under the first sentence, the problem of not being a "seller" in this sense is evident for of course there was no direct contact between plaintiff and defendant prior to sale. The seller, Nordic, for itself and Ford, did make a modification of the warranties as contemplated by 2-316 and a limitation of liability as contemplated by 2-718,9. These two provisions of course deal with separate aspects of this claim, Section 2-714 recognizes that consequential damages, whenever they might be a remedy, can be modified in commercial transactions. Section 2-316 in the Uniform Act also recognizes that express and implied warranties may be modified and/or excluded, and it is interesting to note that the Vermont addition 2-316(5) carries out the pattern of 2-719 and says that 2-316(2,3,4) shall not apply to new or used consumer goods or services. By exclusion therefore, the section does apply to commercial usage, and clearly infers that manufacturers can limit or exclude warranties. For a case denied before 2-316(5) was effective, see Tracy v. Vinton Motors, Inc., 130 Vt. 512, 296 A.2d 269 (1972).

Therefore, given (1) an express disclaimer for consequential loss, (2) a repair or replacement warranty, and (3) an express disclaimer of other express and implied warranty, if there has been performance under the express warranty, even the majority of the cases cited by the plaintiff would mandate the result ordered by Judge Coffrin. Ford Motor Co. v. Olive, 234 So. 2d 910, (Miss. 1970), Morrison v. Chrysler Corp., 270 F. Supp 107 (D. SC. 1967), Smith v. Reynolds Metals Co., 323 F. Supp. 196 (Pa. 1971).

Where some of the cases do reach divergent results is in the event they find a breach of the express warranty to repair or replace. Parenthetically that apparently was not the case in the instant case. There was evidence that the Court could find that the initial problems were a result of the plaintiff being in a hurry, picking up the truck without dealer preparation, but having them attended to when he returned. Bolio described separate subsequent problems, but also described the steps taken to try to resolve them, all without expense to him.

Cases cited in the plaintiff's brief largely follow the theory, not that you cannot limit warranties, not that you cannot eliminate consequential damages, but that if you do not live up to the repair or replace warranty, because either you do not act within a reasonable time (Beals case), or in addition you refuse to repair (Adams case), or you fail to repair (Jones & Knight case and Koehring case), certain damages may result. Some of these courts seem to simply allow damages generally which flow from the breach while others do it on the basis that in view of the failure of the seller to live up to his express warranty to repair or replace, any limitation on other remedies is thereby invalid. In any event, it is

apparent in this case that Judge Coffrin felt that this line of cases had no application to the facts of this case. He was also aware that Bolio picked the truck up in August and testified that he bought a "replacement" for it in October and that based on his figures, which never really established a net loss, even with the most favorable rulings on the agreements, his consequential loss would fall far short of the jurisdictional levels. Contrary to the glowing prose of the plaintiff's brief, no one has told Bolio he has no right to recover, only that he cannot recover against this defendant in this Court. Similarly it is not true as set forth at page 13 of Bolio's brief that he "was prevented from concluding his presentation of evidence." It is quite clear from the transcript that Judge Coffrin gave the plaintiff every chance to present evidence or to make any offer within the limits of his prior rulings.

The plaintiff quite correctly perceives that the defendant relies on County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), although he neglected to add to the citation, aff'd 444 F2d 372, cert. den. 404 U.S. 939, 92 S. Ct. 272, 30 L. Ed. 272. Here again the sales document included both the repair and replacement clause and also the consequential damage clause. There the lower court said:

Plaintiff would have UCC 2-719 read in such a fashion as to result in all limitations whatsoever being stricken in any event in which an exclusive remedy should fail of its essential purpose. A better reading is that the exclusive remedy clause should be ignored; other clauses limiting remedies in less drastic manners and on different theories would be left to stand or fall independently of the stricken clause. Since the clause excluding consequential damages has been held not unconscionable, and is not otherwise offensive, it will

be applied. Therefore, plaintiff will still be allowed to obtain incidental damages, including "commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach," but excluding consequential damages.

The Court was applying Ohio law but said the result would be the same under New York law. It is submitted the same result would obtain in Vermont with the background of the Hathaway and Vinton Motors cases. Also the view of the Court in County Asphalt, and affirmed by this Court, should apply to this case. Viewed separately, the clause limiting consequential damages should be enforced, assuming in fact that they had been proved, and on that basis the rulings of Judge Coffrin were correct. It is apparent from his rulings Judge Coffrin did not find such limitations unconscionable. See County Asphalt, Inc. v. Lewis Welding & Eng. Corp., 444 F.2d 372, 378 (1971).

CONCLUSION

That the order of the District Court be affirmed.

Respectfully submitted,

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January 2, 1975

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Re: Docket No. 74-2173
Richard G. Bolio, Jr. vs Ford Motor Company

Dear Mr. Fusaro:

Enclosed please find for filing with the Court twenty-five copies of the Appellee's Brief in the above captioned case. By copy of this letter, two copies are being forwarded to Gerard F. Trudeau, the appellant's attorney in this matter.

Very truly yours,

DINSE, ALLEN & ERDMANN

jmd/s

By:

John M. Dinse

Encl.

cc: Gerard F. Trudeau, Esquire